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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY EAGAN,

Defendant and Appellant.

B240663

(Los Angeles County  
Super. Ct. No. BA338308)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Anne H. Egerton, Judge. Affirmed.

Chris R. Redburn, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez  
and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

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## ***INTRODUCTION***

A jury convicted Anthony Eagan of the special circumstance murder of his co-perpetrator in the commission of a burglary, attempted home invasion robbery, first degree burglary, two counts of assault and felon in possession of a firearm, with firearm allegations found true. In addition, in a bifurcated proceeding, it was established that Eagan had prior convictions for five counts of first degree robbery, one count of attempted robbery and five counts of second degree robbery in New York. The trial court sentenced him to state prison for life without possibility of parole plus an aggregate indeterminate prison term of 115 years, six months to life and ordered Eagan to pay two direct victim restitution fines in the amounts of \$7,167.40 and \$7,351.76.

He appeals, claiming insufficiency of the evidence, instructional error, ineffective assistance of counsel and error in the imposition of the direct restitution fines.

We affirm.

## ***FACTUAL AND PROCEDURAL SUMMARY***

In July 2006, Sharon Cole lived with her son (Ajani Campbell) and grandson (Ajani Jr.) on the corner of 94<sup>th</sup> Street and Gramercy Place at 2001 West 94<sup>th</sup> Street in Los Angeles. The front of the house faced 94<sup>th</sup> Street but the garage opened onto Gramercy. The interior door between the house and the garage was ordinarily left open.

At about 10:00 pm on July 15, Cole left the hair salon she owned and headed home in her Mercedes. She had her daily receipts for the day and had also collected the rent for the booths she rented to other stylists. As she drove, Cole was speaking with a friend on her mobile telephone and was still on the phone when she reached her home at about 10:30. She pulled into the driveway and used her remote control to open the garage door. When the door opened, a light came on and no one was inside. She pulled into the garage, continuing to speak with her friend on the phone. Before she could close the garage door behind her, a shadow by her partially open driver's side window caught Cole's attention, and when she turned, she saw a young black man (Tyrone McDougal))

standing at her window and pointing a big, shiny gun at her head from a distance of about one foot.

McDougal yelled, "Get out of the car, get out of the car, bitch." Scared and screaming, Cole dropped her phone. McDougal again yelled, "I said get out of the car." Cole screamed for her son who was in his bedroom waiting up for her after putting his son to bed. Campbell jumped up, went to his closet to get his gun and magazine which was stored separate from the gun and headed for the garage. Through the open door, Campbell saw McDougal pointing a gun at his mother's head. He loaded the magazine into the gun and moved toward the garage, hugging the wall.

McDougal continued to yell at Cole, but when she started to open her car door, he put his gun in his waistband and stepped back to make room for her. Cole could see Campbell walking toward her through the doorway leading into the house. At that point, she noticed a second black man (Eagan), and he was holding a gun. Eagan stood behind McDougal toward the back of the car's driver's side, between the garage and house. A third (unidentified) man stood in the frame of the garage door, facing the street with his back to the garage interior.

As Campbell neared the door to the garage, he racked a round into the chamber of his gun. McDougal said, "Watch it, blood," which Campbell understood to mean there was someone else in the garage. He peeked his head through the doorway and saw Eagan with his gun aimed at the door. Eagan fired at Campbell. Cole screamed, and McDougal ducked down as Eagan's bullet passed Campbell's face. Campbell stepped into the garage and raised his gun. Eagan shot his gun again, and Campbell felt his arm go a little numb. Campbell then fired three shots at Eagan who dropped to the ground. He turned to McDougal and fired one shot into his back as McDougal turned to the right. McDougal stumbled toward Eagan and fell on top of him, and the two rolled out of the garage together.

Cole ran to the house and pressed the button to close the garage door. Then Cole and Campbell went back into the house. Campbell called 9-1-1, and he and Cole looked

out the window onto Gramercy where they saw a man run by the window back toward the garage. Cole heard a car engine, and it looked to her like the man was running to a big, dark four-door vehicle. She started screaming again as it drove away.

In the commotion, Cole's seven-year-old grandson woke up, crying and asking what had happened. Campbell told his son to go back to his room as he tried to calm Cole, but she was hysterical. Campbell opened the front door, and Cole grabbed his arm trying to keep him inside, but he stepped out and closed the door.

A car stopped at the corner of 94<sup>th</sup> and Gramercy where Eagan had collapsed in front of a neighbor's house. Eagan got into the car or was pulled inside. Campbell stepped out on the front porch and fired at the car as it drove away.

When Los Angeles Police Department officers responded, Campbell was pacing in front of the house. He pointed out the direction in which the three men had fled. Officers saw two pistols on the ground at the front of the garage, bloodstains on the sidewalk and blood inside the garage. Officers found bullet casings near Cole's car, on a garage shelf, and on the ground where the garage door met the driveway, with several more outside the front door of the house. There was a bullet hole in the doorframe between the garage door and the house, and a bullet was recovered from behind the door.

Just before midnight, on July 16, Los Angeles Sheriff's deputies responded to a vehicle fire at 9812 Budlong Avenue, about a mile and a half from Cole's house. The car was a 1995 silver and burgundy Chrysler Sebring registered to McDougal, and it was parked against the curb. Smoke was leaking through the partially cracked rear driver's side window; the doors were locked. Bloodstains and smears were noted throughout the car. McDougal's body was found in the back seat, in a fetal position, with his head on the right floorboard and his feet on the seat.<sup>1</sup> Embers were burning on his shirt and pants.

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<sup>1</sup> About a week after the shooting, a man named Andrew showed Cole a photograph of a black man she recognized as McDougal. Although she had not seen him for some time, she realized McDougal was the brother of one of her former clients. Cole then gave the photo to police.

There was a bullet hole in the driver's headrest, two bullet holes in the left front fender and one bullet hole in the left front tire; bullets were recovered from the car.

McDougal had suffered gunshot wounds to the right side of his chest, his upper right arm and his right elbow. The chest wound was fatal. All three wounds could have been inflicted while he was facing away from the shooter and turned slightly to the right.

Campbell's nine-millimeter Ruger was registered in his name; it was recovered with a round in the chamber and ready to fire. The nine-millimeter Ruger found in the driveway to Cole's home was unregistered. It had a live round in the chamber, with five additional rounds in the magazine, and was ready to fire. A stolen .40 caliber Smith & Wesson was also found in the driveway. It had nine live rounds in the chamber, but the chamber was empty, and it was not ready to be fired.

According to ballistics analysis, the unregistered Ruger had fired an expended cartridge casing found in the driveway and the bullet recovered behind the door between the garage and the house. Other expended cartridge cases were fired from Campbell's gun. A shoebox containing a .40 caliber magazine, nine rounds of .40 caliber ammunition, and one round of nine-millimeter ammunition were found among McDougal's possessions.

DNA evidence established the blood found in the driveway of Cole's residence as well as the blood found on the handles above the back seats in McDougal's car was Eagan's.

Eagan was charged with the special circumstance murder of his co-perpetrator (McDougal) in the commission of a burglary (count 1; Pen. Code, § 189 [all further undesignated statutory references are to the Penal Code]); attempted home invasion robbery (count 2; §§ 664, 211); burglary (count 3; § 459), first degree burglary, two counts of assault with a deadly weapon (counts 4, 5; § 245, subd. (b)); and one count of being a felon in possession of a firearm (count 6; § 12021, subd. (b)), with special firearm allegations (§ 12022.53, subds. (b), (c); 12022.5, subd. (a); 12022.5). In addition, as to all six counts, it was alleged Eagan had three prior strike convictions (§§ 667, subds. (b)-

(i) & 1170.12, subds. (a)-(d)) and as to counts 1-5, it was alleged he had three prior serious felony convictions (§ 667, subd. (a)(1)).

At trial, the People presented evidence of the facts summarized above. Campbell identified Eagan in a six-pack photographic lineup, at the preliminary hearing and at trial as the person who had shot at him.

At the time of trial, Eagan had scars on his back and chest and on the inner portion of his right forearm; the scar on his right forearm was caused by a gunshot.

Eagan testified in his own defense, describing a drug deal that had gone wrong. He said he was a native New Yorker and had lived there his whole life. He acknowledged he had 12 felony convictions in New York, all involving moral turpitude, and was not allowed to possess a handgun as a result of these convictions.

In July 2006, he testified, he and two friends had driven a truck to California to buy 100 pounds of marijuana for \$40,000. The same amount would have cost \$80,000 in New York. Eagan claimed he did not know anyone in California; one or both of his friends knew McDougal and arranged the purchase with his help. McDougal, not Eagan, knew the name of the seller.

On the night of July 15, Eagan and his friends met McDougal and another man at a restaurant, and then followed them to Cole's residence. He said he did not have a gun and did not know anyone else had one. McDougal and his friend entered the garage. Eagan and his friend walked in while his other friends waited in the truck. Eagan said he could not hear the conversation with Cole but said it sounded like bickering, things got "heated" and Cole yelled, "Why did you bring this person to my house?" Eagan was getting uncomfortable that this was all happening out in the open and he was carrying a lot of money so he decided to walk away when he heard shots. He was hit and had to pound on the car to be allowed inside along with McDougal.

Eagan testified he had no intent to rob anyone and would not steal someone else's property. He understood pointing a loaded gun at someone was dangerous to human life

and could lead to that person pulling out a gun and shooting. He “absolutely” knew that if he shot a gun at someone, there was a high probability that person would shoot back.

He lied to police when he had a lot to lose but denied he had given a false name to Deputy Peter Mitchell in Clinton County, New York in 1996 and said he had told the truth at trial.

In rebuttal, Deputy Mitchell testified he was on patrol on January 31, 1999, when he saw people running from a vehicle. When he was inspecting the vehicle, he found a stolen .40 caliber Sig Sauer inside along with paperwork in Eagan’s name. He followed tracks in the snow leading to the address of 3 Evergreen Street in Plattsburgh where he contacted Eagan. Eagan had identified himself as Leroy Green.

The jury found Eagan guilty as charged on all counts and found the firearm allegations true. In addition, in a bifurcated proceeding, it was established that Eagan had prior convictions for five counts of first degree robbery, one count of attempted robbery and five counts of second degree robbery in New York.

The trial court sentenced Eagan to state prison for life without possibility of parole plus an aggregate indeterminate term of 115 years, 6 months to life, calculated as follows: as to count 1, an indeterminate sentence of life without possibility of parole plus a determinate term of 25 years (20 years pursuant to section 1202.53, subdivision (c) plus 5 years pursuant to section 667, subdivision (a)(1)); as to count 2, a consecutive indeterminate sentence of life, with a minimum term of 29 years, 6 months, plus a determinate term of 25 years (20 years plus 5 years as calculated with respect to count 1); as to count 3, an indeterminate sentence of life, with a minimum term of 25 years, plus a determinate term of 9 years (5 years (§ 667, subd. (a)(1)) plus the mid-term of 4 years (§ 1202.5, subd. (a))) (ordered stayed); as to count 4, a consecutive indeterminate sentence of life, with the minimum term of 27 years plus a determinate term of 9 years (5 years plus 4 years as calculated for count 3); as to count 5, an indeterminate sentence of life, with the minimum term of 25 years, plus a determinate term of 9 years (5 years plus 4 years as calculated for count 3) (ordered stayed); and as to count 6, a concurrent

indeterminate sentence of life, with the minimum term of 25 years. In addition, the trial court ordered Eagan to pay direct victim restitution fines in the amounts of \$7,167.40 to Sharon Cole and \$7,351.76 to McDougall's mother.

Eagan appeals.

### ***DISCUSSION***

#### **Substantial Evidence Supports Eagan's First Degree Murder Conviction.**

According to Eagan, his first degree murder conviction and related special circumstance finding must be reversed for insufficient evidence because, he says, the provocative acts in which he engaged were only burglary and robbery which cannot support a finding he acted with express malice or premeditation and deliberation.

Because Eagan ignores the record, the standard of review and the applicable law, we disagree.

In reviewing the record for substantial evidence, if the evidence reasonably justifies the jury's factual findings and inferences necessarily drawn, the reviewing court may not reverse the judgment merely because it may be reconciled with different inferences or contrary findings. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Instead, we "resolve all conflicts in favor of the judgment and indulge all reasonable inferences from the evidence in support of the judgment." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

The prosecutor pursued a provocative act murder theory in this case based on Eagan's shooting at Campbell during the burglary which provoked Campbell to respond with lethal force, killing McDougal.

The provocative act murder doctrine provides that the perpetrator of an underlying crime is held vicariously liable for the killing of an accomplice by a third party. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 602; *People v. Kainzrantz* (1996) 45 Cal.App.4th 1068, 1076-1081.) Provocative act murder can be first degree or second degree murder. (*Mejia, supra*, 211 Cal.App.4th at p. 604; and see CALCRIM No. 560.)



As our Supreme Court noted in *People v. Gonzalez* (2012) 54 Cal.4th 643, 661, footnote 13, two theories support a first degree murder conviction under this doctrine: “(1) the defendant’s provocative act was a murder or attempted murder that the defendant personally committed willfully, deliberately, and with premeditation” and “(2) the defendant’s provocative act caused death during the defendant’s intentional commission of one of the enumerated felonies in section 189.” Burglary is a felony listed in section 189.

If the provocative act goes beyond that necessary to commit the offense (burglary in this case), a killing that occurs as a result of the provocative act in the commission of the burglary is a first degree murder. (*Mejia, supra*, 211 Cal.App.4th at pp. 619-620.)

Here, Campbell testified he heard his mother scream for help, grabbed his gun and headed toward the garage. The door was open and he could see McDougal pointing a gun at his mother’s head. When McDougal said, “Watch it, blood,” Campbell understood someone else was in the garage, and when Campbell peeked his head inside the door, Eagan fired at Campbell, and a bullet flew past his face. Eagan fired another round, Campbell stepped into the garage and fired three shots toward Eagan before turning to McDougal and firing a shot into his back as he turned.

From this testimony, the ballistics evidence and Eagan’s own testimony he “absolutely” knew that if he shot a gun at someone, there was a high probability that person would shoot back, the jury could reasonably conclude that Eagan fired the unregistered Ruger at Campbell during the commission of a burglary. As assault and discharge of a firearm are not elements of burglary, the shooting was a provocative act evidencing malice. Because Eagan’s provocative act caused Campbell to respond with lethal force, which killed McDougal, Eagan was properly convicted of first degree murder.

**Eagan Has Failed to Demonstrate Prejudicial Error in the Jury’s Instruction with CALCRIM No. 560.**

Eagan says the absence of instructions on express malice and deliberation combined with instructions that the mental state for residential burglary was sufficient to support a first degree murder conviction constituted prejudicial error.

First, the trial court discussed CALCRIM No. 560 and its relationship to first degree and second degree murder at length with counsel during the jury instruction conference, defense counsel raised no objection, and CALCRIM No. 560 is a legally correct instruction (see *Mejia, supra*, 211 Cal.App.4th at p. 617 [CALJIC 8.12, the CALJIC corollary to CALCRIM No. 560, is a correct statement of law]). A defendant may not complain on appeal that a legally correct jury instruction was too general or incomplete unless he or she sought clarifying or amplifying instructions at trial. (*People v. Hart* (1999) 20 Cal.4th 546, 622). Consequently, this claim of error was forfeited.

Moreover, as discussed in the proceeding section, CALCRIM No. 560 encompasses two theories that support first degree murder conviction under the provocative act murder doctrine, and the prosecutor proceeded on the second theory alone. More particularly, the prosecutor argued Eagan’s act of shooting at Campbell during the burglary provoked Campbell to defend himself with lethal force, resulting in McDougal’s murder. It follows that the absence of further instruction on premeditation and deliberation did not constitute prejudicial error in this case.

**Eagan’s Ineffective Assistance of Counsel Claim Is Meritless.**

In Eagan’s view, he was subjected to a second degree murder conviction “at most” so his trial counsel necessarily failed to protect him by allowing him to be convicted of first degree murder. For the reasons addressed in the preceding section, Eagan has failed to demonstrate prejudicial error in the jury’s instruction with CALCRIM No. 560, and in any event, Eagan was subject to a first degree murder conviction on this record so he has failed to demonstrate prejudicial error in his attorney’s failure to “protect” against such a conviction is similarly flawed.

### **The Trial Court Did Not Err in Imposing a Direct Victim Restitution Fine.**

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, and *Southern Union Co. v. United States* (2012) \_\_ U.S. \_\_ [132 S.Ct. 2344], Eagan says the trial court's award of restitution to Cole for damages to her home and car and McDougal's mother (Jennet Pawnell) for funeral and burial expenses violated his right to a jury trial on these issues. We disagree.

The court in *People v. Pangan* (2013) 213 Cal.App.4th 574 considered and rejected the argument Eagan resurrects here. "[N]either *Southern Union*, *Apprendi* nor *Blakely* have any application to direct victim restitution, because direct victim restitution is not a criminal penalty. As explained in *U.S. v. Behrman* (7th Cir. 2000) 235 F.3d 1049, 1054, direct victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits. It is not increased 'punishment.' The *Millard* decision makes the same point in regard to California law. ([*People v.*] *Millard* [(2009)] 175 Cal.App.4th [7,] 35; accord, *People v. Harvest* (2000) 84 Cal.App.4th 641, 645, 650 [101 Cal. Rptr. 2d 135].) *Chappelone* has collected the numerous federal cases also holding victim restitution does not constitute increased punishment for crime. (See [*People v.*] *Chappelone* [(2010)] 183 Cal.App.4th [1159,] 1184.) And we would note the restitution statute itself characterizes victim restitution awards as civil. (See Pen. Code, § 1202.4, subd. (a)(3)(B) [victim restitution 'shall be enforceable as if the order were a civil judgment'].)" (*People v. Pangan, supra*, 213 Cal.App.4th at p. 585.) For the reasons addressed in the *Pangan* case, we reject Eagan's claim.

Furthermore, the trial court was required under section 1201.4, subdivision (f)(4), to fully reimburse the victims for their economic losses. The trial court rejected claims (including Campbell's), which were unsubstantiated, but the restitution here was supported by the evidence presented to the trial court so Eagan cannot establish prejudice in any event. (*Washington v. Recuenco* (2006) 548 U.S. 212, 222; *People v. Sandoval* (2007) 41 Cal.4th 825, 838.)

***DISPOSITION***

The judgment is affirmed.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**SEGAL, J.\***

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.